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No. 92-1503

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

Kaiser Aluminum and Chemical Corporation, a Delaware corporation,

Petitioner,

vs.

Westinghouse Electric Corporation, a Pennsylvania corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Pursuant to Sup. Ct. R. 15.6, petitioner hereby submits its reply to arguments first raised in respondent's opposition brief. In an effort to divert attention from the Rule 8 and First Amendment issues that are central to petitioner's Writ, respondent has raised West Virginia's statutes of limitations for negligence and contract actions as a means of justifying the decisions of the district court and circuit court to dismiss petitioner's action for negligent repair. Respondent's reliance is misplaced.

Westinghouse has attempted to create harmless error by arguing that Kaiser's negligent repair claims are barred by the two-year statute of limitations prescribed for negligence actions by West Virginia Code § 55-2-12(a) (1981 Rep. Vol.). That issue was never raised by respondent in its motion to dismiss under Rule 12(b)(6) and it was never considered by the district court. Consequently, it is not properly before the Court. Not

only is it grossly inappropriate to raise this limitations statute now, respondent's contention that it has any application to the facts of this case is totally devoid of merit.

As pled in petitioner's complaint, the subject rotor was negligently repaired by respondent in April 1981. It was then placed in storage at petitioner's plant until December, 1987. (Complaint, ¶¶ 12, 15, Appendix D, Tab 2.) On December 3, 1987, the "repaired" rotor was installed in petitioner's motor generator set and energized. It failed immediately, resulting in property damage and business interruption losses. (Complaint, ¶¶ 16-19, Appendix D, Tab 2.) Petitioner's action was timely commenced in November, 1988.

In Howard v. United Fuel Gas Co., 248 F. Supp. 527 (S. D. W. Va. 1965), the plaintiff brought an action for personal injuries and property damage based upon a

theory of negligent installation of gas piping. The piping was installed in 1953-1955, and had presumably began to leak then. However, the explosion and ensuing damages did not occur until 1963. In determining that the action was commenced within the applicable statute of limitations, the court held that the cause of action did not accrue until damages were sustained. Id. at 531; accord, Steeley v. Funkhouser, 169 S.E.2d 701, 702 (W. Va. 1969); State ex rel. Ashworth v. State Road Com., 128 S.E.2d 471 (W. Va. 1962). Likewise, petitioner's cause of action accrued on December 3, 1987, when massive electrical failures caused by respondent's negligent repair of the subject rotor resulted in property damage. Consequently, this action for negligent repair was commenced well within the time limits established by West Virginia Code § 55-2-12(a).

Respondent has also discussed the four-year statute of limitations for contracts for sale established by West Virginia's version of the Uniform Commercial Code, West Virginia Code § 46-2-725 (1966), in a further effort to deter the Court from the broader issues raised by petitioner. Contrary to respondent's quotation from the Fourth Circuit's Opinion, this "suit" does not arise "from a sale to a customer-purchaser by a manufacturer of an article to be manufactured pursuant to certain requirements." Circuit Court Decision, Petitioner's Appendix A, Tab 3, p. 9; Respondent's Opposition Brief, p. 11. As respondent well knows, and as the complaint clearly sets forth, the gravamen of petitioner's cause of action is the conduct of Westinghouse as a provider of repair services several years after it manufactured the subject rotor. As the court stated in Howard, supra: "Faulty workmanship implies negligence--not a breach of contract." 248

S.E.2d at 532. Clearly, this action is based upon the negligent provision of services, not the sale of goods. There is no claim that the subject rotor was in a defective condition when it left the manufacturer in 1978 or 1979. Rather, petitioner claims the malfunction was caused by respondent's negligent conduct in the role of repairman in 1981. Accordingly, the statute of limitations regarding the sale of goods provided by West Virginia's version of the Uniform Commercial Code has absolutely no application to petitioner's cause of action.

The circuit court's unwillingness to distinguish the repair services provided by respondent in 1981 from the condition of the subject rotor when sold two to three years earlier provides still another example of how far the Fourth Circuit was prepared to go to dismiss a West Virginia cause of action of which it apparently disapproved. Moreover, it is deplorable that respondent has chosen to rely on out-of-context, misleading

quotations concerning petitioner's prior discussion of Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W.Va. 1982) in a shameless effort to confuse the record. Opposition Brief at p. 9.

Contrary to respondent's contention, petitioner's position regarding Star Furniture has been consistent throughout. Star requires a sudden and calamitous event as a requisite element of a strict liability claim for property damage and/or business interruption losses. 297 S.E.2d at 859. Any application of Star to petitioner's negligent repair cause of action should be limited solely to the question of whether the sudden and calamitous event criterion should be extended from strict liability claims to negligent repair claims. If so, petitioner has abundant evidence to prove that the failure of the rotor on December 3, 1987 was a sudden and calamitous event caused by respondent's negligent repair of the rotor. However, it defies logic to suggest

that petitioner's recognition of the possible application of Star for the limited purpose discussed above constitutes a concession that Star applies for all purposes or that petitioner is pursuing a products liability claim.

CONCLUSION

Respondent seeks to divert the Court's attention from the real issues here. No federal court sitting in a diversity action should be free to ignore the plain allegations of a complaint stating an actionable claim under state law by converting that claim into an independent cause of action comprising uniquely different legal elements. Unless litigants in the federal courts can rely on the principle that they alone are empowered to plead the cause of action that provides them with the best opportunity for redress of grievances, the possibility exists for serious abuse of the judicial process. No court should constructively deny

access to the courtroom door by converting a litigant's claims into a different and untenable cause of action.

Dated this 4th day of May, 1993.

Respectfully submitted,

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